IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 8165 of 1999
with
SPECIAL CIVIL APPLICATION No 8228 of 1999
with
SPECIAL CIVIL APPLICATION No 8248 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE D.H.WAGHELA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SUNRISE POLYMERS INDUSTRIES (INDIA) LTD.

Versus

UNION OF INDIA

Appearance:

MR MIHIR H JOSHI for Petitioner

MR AKSHAY H MEHTA for Respondent No. 1

MR MUKESH R SHAH for Respondent No. 2, 3, 4

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE D.H.WAGHELA

Date of decision: 27/01/2000

ORAL JUDGEMENT (Per B.C.Patel, J.)

Rule. Service of Rule is waived by learned counsel Messrs Mehta and Shah on behalf of the respondents.

2. In reply to the show cause notice issued by the Revenue, the petitioner did not respond and, therefore, the adjudicating authority, namely, Assistant Commissioner of Central Excise & Customs, arrived at the conclusion that, though declaration under Rule 57-G was filed on 10.1.1997, the credit was availed on 9.1.1997. When we put a pointed question whether the said credit was actually utilized on 9.1.1997, the learned counsel submitted that the credit was not actually utilized on 9.1.1997. It is the case of the adjudicating authority that there is no question of any fraud, suppression of fact or mala fide intention on the part of the petitioner. It is in view of these facts, we are examining the matter. We deprecate the method adopted by the assessee in this case as he has not co-operated with the adjudicating authority.

3. It is the grievance of the petitioner that he preferred an appeal against the order as well as the stay application which came to be disposed of vide Annexure-B on 4.1.1999 and that while rejecting the stay application, a mechanical order was passed. It was pointed out to us that, in the past on several occasions, High Court had called upon the appellate authority to decide the matters keeping in mind the material facts, position of law and other aspects. However, in the instant case, the stay application has been disposed of mechanically. As a result of this, the appeal has also been dismissed subsequently. Before that, the assessee submitted an application on 4.2.1999 for recalling the order passed on the stay application. However, it was not disposed of for a pretty long period and on 22.9.1999, the appeal has been rejected on the ground of non-compliance with the order of pre-deposit.

4. Our attention has been drawn to the decision of this Court in the case of DCW LTD. v. COMMISSIONER (APPEALS) reported in 1998 (97) ELT 424 wherein the Division Bench has pointed out as under:

" The Supreme Court also held in para 7 that the appellate authority has also been vested with the

discretion to dispense with such deposit unconditionally or on conditions and it should also apply its mind on that question like a quasi judicial authority taking into consideration all the facts and circumstances of the case including the undue hardship which may be pointed out. Same is the position in respect of discretion and its exercise in a reasonable and rational manner taking into consideration the relevant facts and circumstances of a particular appeal while considering the question as to whether deposit of the amount or the penalty be dispensed with unconditionally or subject to the conditions."

It is required to be noted that the appellate authority is required to decide the application in accordance with law. The appellate authority has to consider the relevant facts, namely, the prima facie case of the appellant and the conduct of the parties. The Apex Court in the case of VIJAY PRAKASH D. MEHTA v. COLLECTOR OF CUSTOMS (PREVENTIVE), BOMBAY reported in AIR 1988 SC 2010 has held as under:

" Thus, while refusing to entertain appeal unless certain amount is deposited, where the Appellate Tribunal considered the relevant factors, namely, the probability of the prima facie case of the appellant and the conduct of the parties, it could not be said that the appellant's right of appeal is whittled down by an alteration of procedure. The purpose of the Section is to act in terrorem to make the people comply with the provisions of law."

The Apex Court also pointed out:

" Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant. It is not the law that adjudication by itself following the rules of natural justice would be violative of any right - constitutional or statutory- without any right of appeal as such. If the statute gives a right to appeal upon certain conditions, it is upon fulfillment of those conditions that the right becomes vested and exercisable to the appellant."

It is also required to be noted that the Apex Court has pointed out the discretion vested in the appellate authority to dispense with the requirement of pre-deposit in case of undue hardships. That discretion must be exercised on relevant materials, honestly, bona fide and objectively. In the instant case, what is required to be noted is that the appellate authority, namely, Commissioner (Appeals) while rejecting the application might have kept this principle in mind, but there is no whisper in the order on this aspect of the matter. Earlier, orders were passed by the Commissioner (Appeals) in similar fashion and writ petitions were filed in this court. The Division Bench pointed out as to how the authority has to pass orders. In the instant case, usual orders have been passed by the appellate authority, namely, Commissioner (Appeals), and there is non-application of mind and therefore, in our opinion, the order rejecting the application for stay of pre-deposit has been thus vitiated and that order must be held to be bad.

5. As a result of such orders, if the appeals are dismissed, such appeals must be restored. Therefore, we direct the Commissioner (Appeals) to hear the matters afresh and to pass speaking orders in the matters, namely, on the stay applications within four weeks from the receipt of this order.

6. It is to be noted in this matter that the order is passed much earlier, namely, on 29.6.1998 by the adjudicating authority. The petitioner preferred an appeal in the month of August, 1998. On 4.1.1999, without hearing the petitioner, order was passed under Section 35-F of the Central Excise Act, 1944. It is thereafter an application was submitted on 4.2.1999 for recalling the order. Without deciding that application, the appeal has been dismissed. If the petitioner would have approached the court immediately after the order being passed, the matter would have been different.

7. In view of what we have stated above, this application requires to be allowed. Rule is accordingly made absolute to the aforesaid extent.

8. It is clarified that till the applications are decided, no coercive recovery shall be taken against the petitioners.

(KMG Thilake)
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